Litigation Section of The State Bar of Califonia

# Litigation Update

Litigation Section News

June 2007

**Court must determine class certification before ruling on the merits.** If the court rules on the merits before, or concurrently with, the class certification motion, class members may decide whether to opt out of the class based on the ruling on the merits. To avoid such unfairness to defendants, the court must first rule on class certification before ruling on the merits, unless defendant waives the right to have certification decided first by failing to object. *Fireside Bank v. Sup.Ct. (Gonzalez)* (Cal.Supr.Ct.; April 16, 2007) 40 Cal.4th 1069 [155 P.3d 268, 56 Cal.Rptr.3d 861, 2007 DJDAR 4991].

**Court, not arbitrator, determines the existence of a contract.** The Ninth Circuit has ruled that, where a party disputes the existence of a contract containing an arbitration clause, the court, not the arbitrator, must rule on the *existence* of a binding contract. On the other hand, the *validity* or *enforcement* of an arbitration clause must be decided by the arbitrator. *Sanford v. MemberWorks, Inc.* (9th Cir.; April 16, 2007) (Case No. 05-55175) [2007 DJDAR 5028].

**Supreme Court settles limitation period for denied meal and rest periods.** *Lab. Code* §226.7 provides that if employees are denied meal or rest periods, they are entitled to an additional hour of pay for each period missed. It had been an open question whether this right to additional pay was a penalty, subject to a one-year statute of limitations, or additional wages, subject to a three-year statute of limitations. Appellate courts had differed on the issue. The California Supreme Court has now settled the issue: the additional pay to which the employee is entitled under the statute are wages, subject to the three-year statute of limitations. *Murphy v. Kenneth Cole Productions, Inc.* (Cal.Supr.Ct.; April 16, 2007) 40 Cal.4th 1094 [155 P.3d 284, 56 Cal.Rptr.3d 880, 2007 DJDAR 4981].

**Arbitration award not avoided by fact that judge ordering arbitration was disqualified.** *Code Civ. Proc.* §170.1(a)(8)(ii) provides that a judge, who has discussed possible employment with an ADR provider, may be disqualified from hearing matters relating to the enforcement of an agreement to arbitrate. (See, §170.1(a)(8) for the exact scope of this disqualification.) In *Rossco Holdings, Inc. v. Bank of America* (Cal. App. Second Dist., Div. 3; April 19, 2007) (as Mod. May 11, 2007) 149 Cal.App.4th 1353, [2007 DJDAR 5397], the judge who granted the motion to compel arbitration should have disqualified himself under *Code Civ. Proc.* §170.1(a)(8)(ii).

Following the issuance of the arbitrator's award, a second judge vacated the award based on a finding that the order compelling arbitration was void because of the prior judge's disqualification. The Court of Appeal disagreed and held that, although the order compelling arbitration was void, this did not, in and of itself, void the arbitration award. The duty to arbitrate arose from the contract between

The Litigation Section of the California State Bar is evaluating whether and how the *California Code of Civil Procedure* and *California Rules of Court* should be amended to deal with discovery of electronic information. The Section needs your help and asks that you take a few moments to participate in a member survey that seeks your experience and opinions about what is working and what is not working in this area. Your participation is anonymous unless you choose to share your contact information. The survey will take approximately 10 minutes.

To participate, click here or paste this web address into your web-browser: http://www.surveyconsole.com/console/takesurvey?id=195323

Your participation is important and greatly appreciated.

## Participate In The Discussion Board Excitement

See what all the excitement is about! We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion.

If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board.

Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with. Go to: http://members.calbar.ca.gov/discuss to explore the new bulletin board feature—just another benefit of Litigation Section membership.

**Remember to first fill out the Member Profile to get to the Discussion Board!**

the parties; not from the judge's void order.

**Vexatious litigant statute passes constitutional muster.** *Code Civ. Proc.* §§ 391 ff. requires issuance of a judicial pre-filing order before a vexatious litigant may file suit. The statute defines vexatious litigants based on prior filings of unmeritorious suits, frivolous papers, or engaging in frivolous tactics. In *Wolfe v. George* (9th Cir.; April 30, 2007) (Case No. 05-16674) [2007 DJDAR 6136], plaintiff argued that the statute violated a number of constitutionally protected rights. The Ninth Circuit disagreed, finding the statute served a legitimate state interest in preventing the tying up of courts and protecting defendants against frivolous lawsuits.

**Collaborative law found to violate legal ethics.** The ABA reports that the Colorado Bar Association's ethics committee declared that collaborative law, a process by which lawyers agree to withdraw if settlement talks collapse, is per se unethical. The idea behind collaborative law, its proponents say, is to encourage settlement by easing the exchange of information between parties. The process would bar the use of that information and require the lawyers to withdraw should the dispute go to court.

**Physicians failed to exhaust administrative remedies.** When a hospital sought to discipline eight physicians on their staff, they requested a hearing as provided by the hospital's bylaws. The hospital decided to conduct eight individual hearings; the physicians wanted a single consolidated hearing and, when the hospital refused this request, sued to compel a single hearing. The trial court issued a writ of mandate ordering a consolidated hearing. The Court of Appeal reversed. Under the bylaws, the decision whether to grant a consolidated hearing was appealable to the hospital's board of directors. Having failed to seek relief from the board, the physicians failed to exhaust their administrative remedies. *Eight Unnamed Physicians v . Medical Executive Committee* (Cal. App. First Dist., Div. 1; May 2, 2007) (as Mod. May 22, 2007) 150 Cal.App.4th 503, [2007 DJDAR 6193].

**No attorney fees to defendant in SLAPP-back motion.** Under the anti-SLAPP statute (*Code Civ. Proc.* §425.16) a defendant who is successful in having a motion to strike granted under the statute is entitled to attorney fees. But a defendant successful in having a motion to strike granted under the SLAPP-back statute (*Code Civ. Proc.* §425.18) is not entitled to such fees. Section 425.18 provides that subdivision (c) of §425.16, which awards such fees to the prevailing defendant, does not apply to SLAPP-back motions. *Hutton v. Hafif* (Cal. App. Second Dist., Div. 5; May 3, 2007) 150 Cal.App.4th 527, [2007 DJDAR 6280].

SLAPP-back is defined in §425.18, subd. (b)(1) as a "cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under Section 425.16."

**Limits on power of court to grant new trial based on the verdict being "against the law."** *Code Civ. Proc.* §657(6) empowers the trial court to order a new trial if the verdict is "against the law." *Fergus v. Songer* (Cal. App. Second Dist., Div. 6; May 3, 2007) 150 Cal.App.4th 552, [2007 DJDAR 6289], holds that if a verdict is supported by substantial evidence, it is not "against the law" and, based on this holding reversed a trial court's grant of a new trial after a jury verdict. The trial court had based its decision on a finding that the verdict was "against the law" but the Court of Appeal concluded that it was supported by substantial evidence.


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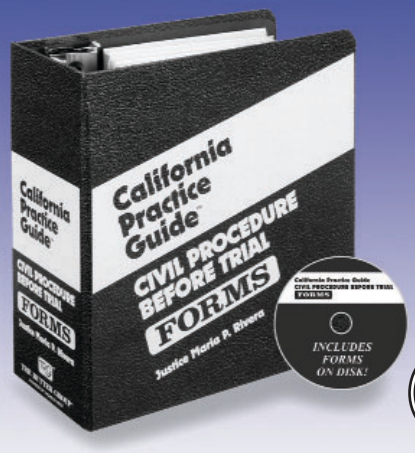


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